

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID D. DELAY,

Defendant.

NO. CR15-175RSL

ORDER DENYING  
GOVERNMENT’S MOTION TO  
RESCIND DELAY’S  
COMMUNICATIONS PRIVILEGES  
AND DENYING DEFENDANT’S  
MOTION FOR ORDER TO SHOW  
CAUSE

This matter comes before the Court on the government’s “Motion to Rescind Delay’s Communications Privileges at the FDC,” Dkt. # 196, and defendant’s “Motion for Order to Show Cause Re: Conditions of Confinement,” Dkt. # 207. Citing defendant’s continued practice of posting messages related to this case on social media via written communication with his family, the government seeks an order rescinding defendant’s “telephone, visiting, and postal mail privileges” for communication with anyone other than his defense team during the remainder of his pretrial detention at the Federal Detention Center (“FDC”). Meanwhile, defendant requests an order preventing FDC staff from confining him in the Special Housing Unit (“SHU”), which he argues is interfering with his ability to contact defense counsel. Having

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MOTION FOR ORDER TO SHOW CAUSE - 1

1 considered the parties' briefing and the rest of the record in this case,<sup>1</sup> the Court finds as follows.

2 This Court has repeatedly ordered defendant not to contact parties or witnesses in this  
3 case and not to publish materials deemed "protected" or "sensitive" by the applicable protective  
4 order. Dkt. ## 28, 100, 180. The government alleges that defendant has evaded these  
5 restrictions by dictating messages to his parents and daughter for posting on a public Facebook  
6 page. Some of these messages contain personal information about potential witnesses; another  
7 accuses a detective assigned to this case of being a "dirty cop" and makes reference to police  
8 shootings. The government asserts that such messages tamper with witnesses and obstruct  
9 justice, and argues that the only way to preserve the integrity of defendant's criminal trial is to  
10 ban all communication by defendant with anyone other than his defense counsel.

11 As defendant points out, the First Amendment prevents this Court from issuing the sort of  
12 blanket gag order that the government seeks. In *Levine v. United States District Court for the*  
13 *Central District of California*, 764 F.2d 590 (9th Cir. 1985), the Ninth Circuit held that a court  
14 order preventing defendant, defense counsel, and their agents from discussing the case with  
15 news media constituted a prior restraint triggering strict scrutiny under the First Amendment. *Id.*  
16 at 595. Accordingly, such an order is constitutional only if the government establishes that (1)  
17 the activity restrained poses either a clear and present danger or a serious and imminent threat to  
18 a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive  
19 alternatives are not available. *Id.* The government has not met its burden of showing that a  
20 similar restraint on defendant would pass constitutional scrutiny.

21 The government argues that defendant's communications privileges pose a serious and  
22 imminent threat to the integrity of his trial. The Court agrees that witness tampering is a serious  
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24 <sup>1</sup> Defendant requests oral argument on the government's motion, and an expedited evidentiary  
25 hearing regarding his motion for an order to show cause. Dkt. ## 203, 207. The Court concludes that  
26 both matters are appropriate for determination without a hearing and denies defendant's requests.

1 threat to a trial's integrity; nevertheless, rescinding all of defendant's communications privileges  
2 is neither narrowly drawn nor the least restrictive method of preventing such tampering. *See*  
3 *Levine*, 764 F.2d at 599 (finding overbroad the trial court's order banning all discussion of the  
4 case with the media, and requiring the court instead to "fashion an order specifying the  
5 proscribed types of statements"). The government's motion must be denied.

6 The Court also denies defendant's motion for an order to show cause regarding his  
7 conditions of confinement. Defendant has failed to exhaust his administrative remedies; his  
8 disciplinary record has rendered him ineligible for placement in his previous general unit; and  
9 though defendant was released from the SHU on December 16, 2016, he opted to remain there  
10 rather than transfer to a new general unit. Dkt. # 207 at 3–4. Provided the FDC ensures  
11 defendant's access to his defense counsel and to electronic discovery materials by heeding  
12 defendant's requests, the Court sees no reason to interfere with the FDC's housing decisions.

13 Defendant is advised that his conduct continues to test the patience of this Court and  
14 requires his defense counsel to devote time and resources to motions practice rather than to  
15 preparation for his impending trial.

16  
17 For all the foregoing reasons, the government's motion to rescind defendant's  
18 communications privileges (Dkt. # 196) is DENIED. Defendant's motion for an order to show  
19 cause (Dkt. # 207) is DENIED.

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21 DATED this 19th day of January, 2017.

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24 Robert S. Lasnik  
25 United States District Judge

26 ORDER DENYING GOVERNMENT'S MOTION  
27 TO RESCIND DELAY'S COMMUNICATIONS  
28 PRIVILEGES AND DENYING DEFENDANT'S  
MOTION FOR ORDER TO SHOW CAUSE - 3